No. 89-65

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

FORT STEWART SCHOOLS,
Petitioner,
v.
FEDERAL LABOR RELATIONS AUTHORITY
and
FORT STEWART ASSOCIATION OF EDUCATORS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF FOR AMICUS CURIAE NATIONAL TREASURY EMPLOYEES UNION IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the National Treasury Employees Union (NTEU), is a federal sector labor union that is the exclusive bargaining representative of over 140,000 federal employees nationwide. NTEU represents the interests of members of its bargaining units by, among other things, negotiating collective bargaining agreements

with agency employers and arbitrating grievances under those agreements.

NTEU has made pay proposals for workers in two agencies, the Nuclear Regulatory Commission and the Federal Deposit Insurance Corporation, where wages are not set by federal statute. In fact, NTEU's own petition for certiorari is pending before the Court in a related case, *National Treasury Employees Union v. United States Nuclear Regulatory Commission, petition for writ of certiorari pending*, No. 89-198, which the Court is apparently holding in abeyance until disposition of the instant case, as requested by the Solicitor General. *See also FLRA v. National Treasury Employees Union, petition for writ of certiorari pending*, No. 89-562. NTEU's case raises an issue identical to the first issue here, regarding the negotiability of wages as "conditions of employment" under the Civil Service Reform Act. 5 U.S.C. 7103(a)(14). The two remaining questions in the NTEU case, moreover, are similar to the second and third issues here. These questions relate to the effect NTEU's pay proposals have on management's budget rights and the degree of pay discretion an agency must have to be able to bargain over compensation matters.

NTEU and its members, in short, have a strong and direct interest in the instant proceeding, as well as expertise relating to those issues. Accordingly, NTEU files this brief as *amicus curiae* in support of respondents, the Federal Labor Relations Authority and the Fort Stewart Association of Educators, with the written consent of all parties.

SUMMARY OF ARGUMENT

Pay proposals are negotiable because wages are "conditions of employment," which are defined in the Civil Service Reform Act (CSRA) to include both personnel policies and practices, as well as matters affecting work-

ing conditions. 5 U.S.C. 7103(a)(14). The Agency's attempt to limit "conditions of employment" to "the physical conditions under which an employee labors," is illogical and unsupported by the statutory language. Moreover, federal agencies routinely negotiate about, and arbitrate grievances concerning, "conditions of employment" that are totally unrelated to the physical aspects of a job.

The Agency also wrongly asserts that the phrase "conditions of employment" is used in other federal labor statutes to exclude wages; on the contrary, the phrase includes pay matters under other such statutes. In any event, Congress adopted the operative language in the CSRA from the predecessor executive order program governing federal labor relations, under which compensation matters were consistently viewed as negotiable personnel policies, where not governed by statute. The legislative history of the CSRA, furthermore, demonstrates that Congress intended to broaden, and in no way diminish, the scope of federal collective bargaining, which had always included pay bargaining for employees whose pay was not set by law. Finally, given the structure of this statutory scheme, Congress would have specifically excluded all wage bargaining, if that is what it intended.

The Agency unreasonably seeks to nullify Congress' intent to permit pay bargaining (where wages are not set by statute) by claiming that such bargaining would necessarily interfere with management's right to determine its budget under 5 U.S.C. 7106(a)(1). The Federal Labor Relations Authority (FLRA) has constructed a reasonable rule that requires agencies to show that a proposal would lead to unavoidable and significant increased costs that would not be outweighed by compensating benefits. Management cannot hide behind the budget right where it is unable to demonstrate that a sound cost-benefit analysis renders the proposal unjustified.

Finally, the pay proposals here are not inconsistent with the Agency's statutory discretion to set wages, nor with an Agency rule for which there is a "compelling need." *See* 5 U.S.C. 7117(a)(1) and 7117(a)(2). Pay bargaining is consistent with an agency's statutory pay authority where, as here, management has a significant degree of discretion in fixing wages.

ARGUMENT

I. WAGES ARE "CONDITIONS OF EMPLOYMENT" WITHIN THE MEANING OF TITLE VII OF THE CIVIL SERVICE REFORM ACT.

In accord with the FLRA, the Eleventh Circuit below and the Second Circuit have had no trouble concluding that the most basic of all incidents of employment—namely wages—are "conditions of employment" within the meaning of the statute governing federal labor relations. Appendix to petition for certiorari (Pet. App.) 7a; *West Point Elementary School Teachers Ass'n v. FLRA*, 855 F.2d 936, 942-44 (2d Cir. 1988). "Conditions of employment" is the basic phrase Congress has used to describe matters to be negotiated, unless they are made non-negotiable by specific exclusions. 5 U.S.C. 7103(a)(12). For example, wages for the vast majority of federal employees are set by other federal laws, so their pay is made non-negotiable by the exclusion for matters "provided for by Federal statute." 5 U.S.C. 7103(a)(14)(C). "Conditions of employment" are defined in the CSRA as encompassing all "personnel policies, practices, and matters . . . affecting working conditions." 5 U.S.C. 7103(a)(14).

Petitioner Fort Stewart Schools (the Agency) takes the position that the statutory reference to "conditions of employment" is "most naturally read to refer to the physical conditions under which an employee labors." Petitioner's Brief (Pet. Br.) 17. The Agency would have

considerable difficulty convincing an employee of this alleged natural reading. Pay, not desk location or other physical attribute, is the key "condition" of an employment relationship, within any common understanding of the word.

Moreover, the Agency seems to disregard the fact that the extremely broad statutory definition of "conditions of employment" includes "personnel policies [and] practices." The Agency can offer no persuasive explanation why decisions concerning employee pay do not constitute "personnel policies" or practices. Contrary to the Agency's apparent position, there is simply no basis for suggesting that such policies and practices may be reasonably construed as limited to the physical circumstances of the workplace. Indeed, well settled precedent under the CSRA is to the contrary. *See, e.g., EEOC v. FLRA*, 744 F.2d 842, 850 n.18 (D.C. Cir. 1984), *cert. dismissed*, 476 U.S. 19 (1986) ("matters . . . affecting working conditions" are not limited to job surroundings and, in any event, personnel policies and practices are not so limited); *Department of Defense v. FLRA*, 685 F.2d 641, 647 (D.C. Cir. 1982) (policies regarding the rationing of consumer goods at military post exchanges are conditions of employment).

The Agency's assertion that the definition of "conditions of employment" embraces only "the physical conditions under which an employee labor" suffers from five other fatal flaws. First, it would read out of the statute innumerable topics that are routinely negotiated, and grieved, in the federal sector. Second, it is based on the demonstrably incorrect premise that "other federal labor statutes confirm[] that Congress does not regard 'wages' as a 'condition[] of employment.'" Pet. Br. 17. Third, the CSRA adopted the operative language and precedent under the predecessor executive order program, under which wages were consistently deemed negotiable where not provided for by statute. Fourth, the legislative his-

tory demonstrates that Congress intended the scope of bargaining under the CSRA to be broader, not narrower, than under the executive orders, and intended that employment matters be negotiable when not governed by other statutes; the Agency reads passages from the legislative history regarding general unavailability of pay bargaining, for the majority of federal workers, out of context. Fifth, the Agency incorrectly reasons that Congress would have listed pay as a negotiable item, if it so intended; on the contrary, the structure of this particular statutory scheme makes it more likely that Congress would have excluded pay, if that were the intended result.

A. Federal Agencies Routinely Negotiate, and Arbitrate, Over "Conditions of Employment" That Do Not Relate to Physical Job Conditions.

The Agency's novel position—that "conditions of employment" include only "the physical conditions under which an employee labors"—would rewrite the history of federal collective bargaining. It would also rewrite the history of grievance arbitration, which includes claims of violations of law or regulations "affecting conditions of employment." *See* 5 U.S.C. 7103(a)(9)(C)(ii).

First, collective bargaining agreements have always contained provisions unrelated to physical job conditions. Federal agencies routinely bargain over such non-physical matters. NTEU's most recent contracts with the Internal Revenue Service (IRS), the Customs Service (Customs), and the Department of Health and Human Services (HHS) illustrate this point. Each contract includes innumerable negotiated items that are patently unrelated to "the physical conditions under which an employee labors."

Even cursory review of the Tables of Contents of these three contracts (reproduced hereto as addenda A,

B and C) demonstrates that most of the issues governed by these collective bargaining agreements are in no way related to "the physical conditions under which employees labor," but relate instead to other important aspects of the employment relationship. Examples include, but are not limited to: 1) merit promotion (IRS Contract Art. 13, Customs Contract Art. 17, HHS Contract Art. 19); 2) training and career development opportunities (IRS Contract Art. 30, Customs Contract Art. 10, HHS Contract Art. 21); 3) performance appraisal systems (IRS Contract Art. 12, Customs Contract Art. 16, HHS Contract, Art. 46); 4) incentive awards (IRS Contract Art. 18, HHS Contract Art. 45); 5) employee counseling programs (HHS Contract Art. 43); 6) leave, from annual to maternity, to administrative, to sick leave policies (IRS Contract Art. 32-36, Customs Contract Art. 13, HHS Contract, Art. 30-35); and 7) outside employment (IRS Contract Art. 6, Customs Contract, Art. 26, HHS Contract Art. 51).

Second, the Agency's startling notion that "conditions of employment" under the CSRA are limited to "physical" job conditions is refuted by the history of grievance arbitration under the statute. Congress has used the all inclusive, generic phrase "conditions of employment" to define the scope, not just of collective bargaining, but of certain grievances as well. Congress has made a finding that employees' right to organize "facilitates and encourages the amicable settlements of disputes between employees and their employers involving *conditions of employment*. . . ." 5 U.S.C. 7101(a)(1)(C) (emphasis supplied). Each collective bargaining agreement must contain grievance procedures providing for binding arbitration. 5 U.S.C. 7121(b)(3)(C). A "grievance," in turn, is defined as including "any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting *conditions of employment*." 5 U.S.C. 7103(a)(9)(C) (emphasis supplied).

It is abundantly clear, after eleven years of grievance arbitration under the CSRA, that "conditions of employment" encompassed by the mandatory grievance procedures are not limited to physical aspects of a job. The grievance procedure embraces claimed violations of laws or rules affecting conditions of employment that have nothing to do with physical work conditions. *See, e.g., EEOC v. FLRA*, 744 F.2d at 850 n.18; *Andrade v. Lauer*, 729 F.2d 1475, 1485 (D.C. Cir. 1984) (claimed violations of law, rule or regulation "affecting conditions of employment" include reductions in force, which therefore are subject to mandatory arbitration procedures). The Agency's interpretation of "conditions of employment" thus conflicts with grievance arbitration, in addition to collective bargaining, practices in the federal sector. To achieve its desired result of excluding pay from the "conditions of employment" that are made negotiable by section 7103(a)(12), the Agency is forced to read that phrase in a manner conflicting with its undisputed meaning under subpart (a)(9) of the same section.

B. Wages Are "Conditions of Employment" Under Other Federal Labor Statutes.

The Agency is simply wrong in asserting (Pet. Br. 17) that Congress has used the terms "conditions of employment" or "working conditions" to exclude pay in other federal labor statutes. On the contrary, these terms include compensation in such statutes, including the National Labor Relations Act (NLRA).

In the every first section of the NLRA, which lists fundamental "Findings and declaration of policy," Congress specifies wages and hours as the two basic "working conditions." Congress declared that collective bargaining promotes the flow of commerce by encouraging "friendly adjustment of industrial disputes arising out of differences as to *wages, hours or other working conditions.*" 29 U.S.C. 151 (emphasis supplied). Similarly, Congress included rates of pay and wages as examples of "conditions

of employment" triggering collective bargaining rights. Section 9(a) of the NLRA provides that labor representatives shall be exclusive representatives of all unit employees "for the purposes of collective bargaining in respect to *rates of pay, wages, hours of employment, or other conditions of employment* . . . ." 29 U.S.C. 159(a) (emphasis supplied). Since the Wagner Act of 1933, therefore, Congress has expressly classified pay among "working conditions" and "conditions of employment," the same language used in the CSRA.

Nowhere in the NLRA does Congress depart from its designation of wages as "conditions" of employment. The Agency heavily relies (Pet. Br. 18) on section 8(d) of that statute, added by the 1947 Taft-Hartley amendments. That section, however, in no way undermines the long-standing classification of wages as conditions of employment, but merely uses the generic phrase "terms and conditions," to describe wages and other such incidents of employment.

Section 8(d), which imposed a mutual obligation to bargain in good faith, on unions as well as employers, authorizes such collective bargaining over "wages, hours and *other terms and conditions* of employment." 28 U.S.C. 158(d) (emphasis supplied). The use of the word "other" reflects Congress' view that wages and hours, among other matters, are both "terms and conditions" of employment.

There is no basis for parsing the phrase "terms and conditions" and classifying wages as solely terms and hours as solely conditions. "Conditions" and "terms" are synonyms. Roget's International Thesaurus 383 (4th ed. 1977); Webster Encyclopedic Dictionary, Dictionary of Synonyms and Antonyms 16 (1980 ed.). Hours are no less "terms" of employment than are wages. Conversely, wages are as much "conditions" of employment as are hours. The Agency's attempt to draw a distinction be-

tween "terms" and "conditions" distorts what has always been considered to be a single, generic phrase. *See Jacksonville Bulk Terminals, Inc. v. International Longshoremen's Ass'n*, 457 U.S. 702, 714 (1982) (identifying wages, among other things, as being at the core of "terms and conditions of employment").

Both the courts and the National Labor Relations Board, in fact, have consistently held that compensation matters are "conditions of employment" under the NLRA. In *Richfield Oil Corp. v. NLRB*, 231 F.2d 717 (D.C. Cir.), *cert. denied*, 351 U.S. 909 (1956), the court of appeals, enforcing a Board decision, held that an employer's stock purchase plan was within the duty to bargain. The court agreed with the Board that the plan constituted "wages" and alternatively held that such financial consideration—offering "emoluments of value"—in any event qualified as "conditions of employment." 231 F.2d at 724.

In so holding, the D.C. Circuit embraced the Seventh Circuit's decision in *Inland Steel Co. v. NLRB*, 170 F.2d 247 (7th Cir. 1948), *cert. denied*, 336 U.S. 960 (1949), which had held, again in agreement with the Board, that a retirement and pension plan qualified as both wages and conditions of employment. 170 F.2d at 253. Both *Richfield Oil Corp.* and *Inland Steel Co.* expressly recognized that employee compensation, in whatever form, constitutes an essential "part of the consideration for work performed" by which the employee's "financial status would be enhanced." For these reasons, such compensatory matters are "clearly included" in the phrase "conditions of employment" as used in the NLRA. 231 F.2d at 724, *quoting* 170 F.2d at 253. *See also Weyerhaeuser Timber Co.*, 87 N.L.R.B. 672 (1949) (holding that employer furnished meals were both wages and conditions of employment); *Singer Manufacturing Co.*, 24 N.L.R.B. 444 (1940), *modified on other grounds and enforced*, 119 F.2d 131 (7th Cir.), *cert. denied*, 313 U.S. 595 (1941) (holding that bonuses are an integral part of

the working conditions of employees and thus a subject of bargaining).[1]

As one authority has summarized, employee compensation "in a wide variety of forms has been held to be 'wages' or 'other conditions of employment,' and thus a mandatory subject of bargaining." Smith, Merrifield & St. Antoine, *Labor Relations Law* 612 (5th ed. 1974).

In addition to the NLRA, other federal statutes cited in the Agency's own brief (Pet. Br. 18-19 & n.9) classify pay matters as "conditions of employment." The Senior Executive Service Act provides for a "compensation system, including salaries, benefits, and incentives and for *other conditions of employment.*" Pub. L. No. 95-454, Tit. IV, § 402(a), 92 Stat. 1154, *codified at* 5 U.S.C. 3131(1) (emphasis supplied). Similarly, 18 U.S.C. 4082(c)(2)(iii) provides for "the rates of pay and *other conditions of employment*" of federal prisoners on work release. (Emphasis supplied).

The Agency's fundamental premise, in short, is in error. Contrary to the Agency's assertion (Pet. Br. 17), a review of other federal labor statutes reveals that Congress in fact regards wages as conditions of employment and working conditions. It is the Agency alone, not Congress, which attempts to draw an illogical distinction between "terms" and "conditions" of employment.

C. The CSRA Adopted the Operative Language of the Executive Order Program, Under Which Wages Were Treated as Negotiable Personnel Policies, Practices or Matters Affecting Working Conditions.

This Court has already implicitly recognized that Congress used the term "conditions" of employment in the CSRA as meaning the same thing as "terms" or other

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[1] *See also* Morris, *The Developing Labor Law*, Ch. 16 at 750, 758 (1983) (explaining *Singer* and also noting that the 1947 Taft Hartley amendments did not alter Board definitions of subjects of bargaining).

incidents of employment. "[T]he Act requires federal agencies and unions representing agency employees to 'negotiate over *terms and conditions of employment*, unless a bargaining proposal is inconsistent with existing federal law, rule, or regulation.'" *Cornelius v. Nutt*, 472 U.S. 649, 652 (1985) (emphasis supplied), *quoting Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. 89, 92 (1983).

Wages have always been viewed as "conditions of employment," which are negotiable so long as not governed by statute, under the labor-management program in the federal sector. The CSRA's definition of "conditions of employment" as "personnel policies, practices and matters . . . affecting working conditions" was adopted verbatim from executive orders governing labor relations. Exec. Order No. 10,988, § 6(b), 27 Fed. Reg. 551 (1962), *reprinted in Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, 96th Cong., 1st Sess. 1211, 1214 (Comm. Print 1979) *(Legislative History)*; Exec. Order No. 11,491, § 11(a), 43 Fed. Reg. 17,605 (1969), *Legislative History* at 1250.

This language was consistently viewed as including wages for those employees whose pay was not provided by statute. President Kennedy's 1961 task force, chaired by Secretary of Labor Arthur Goldberg, formulated the first government-wide labor relations policy. The task force reported that numerous agencies had voluntarily recognized employee organizations and that certain agencies had "relationships that are close to full scale collective bargaining" with unions.[2] Report of the President's Task Force on Employee-Management Relations in the Federal Service, a Policy for Employee-Management Cooperation in the Federal Service (1961), *Legislative History* at 1187.

[2] Specifically, the Tennessee Valley Authority and some offices of the Department of the Interior had engaged in such bargaining. *Legislative History* at 1187.

The presidential task force reported that employers "in most parts of the Federal Government cannot negotiate on pay, hours of work or most fringe benefits" because such matters "are established by law." *Legislative History* at 1200. Where not established by law, however, pay matters were negotiated. For example, the Interior Department had been voluntarily bargaining, with unions such as the IBEW, over pay for skilled craftsmen and semiskilled laborers who were exempt under the Classification Act. *Department of Energy, Western Area Power Administration and IBEW Locals 640, 1245, 1759, 1959 and 2159*, 22 F.L.R.A. 758, 802-03 (1986). Certainly, the rights of specified groups of skilled craftsmen to bargain over pay matters have long been recognized. *See* 5 U.S.C. 5342(a)(2); 5343 note. When President Kennedy's task force developed a government-wide labor-relations model, it expressly recommended that agencies be permitted to continue to bargain over wages for those employees whose pay was not set by statute. Subjects for collective bargaining, as viewed by the task force, would include "where permitted by law the implementation of policies relative to rates of pay and job classification." *Legislative History* at 1201. President Kennedy accordingly directed the preparation of an executive order pursuant to the task force's recommendations, noting that "where salaries and other *conditions of employment* are fixed by the Congress these matters are not subject to negotiation." *Legislative History* at 1178 (emphasis supplied). Salaries not fixed by Congress, however, were to remain among such negotiable "conditions of employment."

Thus, the first executive order setting a government-wide labor relations program was created, authorizing negotiations over "personnel policy and practices and matters affecting working conditions, so far as may be appropriate subject to law and policy requirements." Exec. Order 10,988, § 6(b), *Legislative History* at 1214. President Nixon, moreover, retained the same operative language when he revised the labor relations program

through Executive Order No. 11,491. Section 11(a) of the Nixon Executive Order required negotiation as to "personnel policies and practices and matters affecting working conditions, so far as may be appropriate under applicable laws and regulations. . . ." *Legislative History* at 1250.

The Federal Labor Relations Council (FLRC), consisting of the Secretary of Labor, Civil Service Commission Chairman, and an official from the office of Management and Budget, was the predecessor of the FLRA, charged with responsibility for resolving negotiability disputes. In its very early stages, the FLRC read the key language—"personnel policies and practices and matters affecting working conditions"—to include pay.

In 1972, the FLRC was confronted with proposals relating to faculty compensation at the U.S. Merchant Marine Academy. The FLRC concluded that such bargaining was not inconsistent with federal law and specifically held that the pay proposals were "negotiable as 'personnel policies and practices and matters affecting working conditions' under section 11(a)" of Executive Order No. 11,491. *United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy*, 1 F.L.R.C. 211, 218 (1972). Similarly, the FLRC held in February 1978, just a few months before enactment of the CSRA, that pay proposals regarding teacher salaries at overseas dependents schools were negotiable under the same executive order. *Overseas Education Ass'n and Department of Defense Dependents Schools*, 6 F.L.R.C. 231, 232-34 (1978).

Contrary to the Agency's protestations that these two cases turned on whether the pay proposals were contrary to other statutes or regulations (Pet. Br. 25), the FLRC's pay decisions are directly applicable here. There would have been no reason to reach the question of inconsistent law if the pay proposals were not within the scope of the

executive order, which embraced only "personnel policies and practices and matters affecting working conditions," the same operative language later used in the CSRA.

The Agency's main attempt to escape from the FLRC pay decisions is to argue that "it appears that Congress was unaware of them." Pet. Br. 25. Such an assumption, however, turns a basic rule of statutory construction on its head. In the absence of evidence to the contrary, which does not exist here (*see, infra* at 16-19), Congress is presumed to have been aware of, and to have adopted, administrative interpretations of a pre-existing law. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978); *New York Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d 502, 509 (2d Cir.), *cert. denied*, 474 U.S. 846 (1985).

In this instance, in fact, Congress affirmatively expressed its intent to adhere to prior "decisions issued under [the] Executive Orders" governing labor relations, "unless superseded by specific provisions" of the CSRA. 5 U.S.C. 7135(b). The CSRA's adoption of the nearly identical definition of those employment incidents subject to bargaining does not "supersede" the executive orders in the sense of rejecting prior precedent interpreting that same language. On the contrary, the use of the same terms provides strong evidence that Congress intended to adopt the FLRC precedent treating wages as negotiable personnel policies, as the court below concluded. Pet. App. 12a-13a.

D. The Legislative History Supports, Rather Than Undermines, the Interpretation That Pay Is Negotiable Where Not Set By Separate Statute.

There is abundant evidence that Congress intended to continue the bargaining over pay that had taken place under the executive order program, and no evidence of intent to cut back on such bargaining rights. The scope of negotiations under the CSRA was to be no narrower than what had taken place under section 11(a) of Ex-

ecutive Order 11,491. S. Rep. No. 969, 95th Cong., 2d Sess. 104 (1978), *Legislative History* at 764. Congressman Udall emphasized that employees were being given "greater rights" than they had before. 124 Cong. Rec. 25,716 (1978), *Legislative History* at 850. As Congressman Ford stated, in explaining the express preservation of the rights of certain "prevailing rate" employees to negotiate over pay, "we should not now be narrowing the preexisting collective bargaining rights of *any group* of Federal employees." 124 Cong. Rec. H8468 (daily ed. Aug. 11, 1978), *Legislative History* at 857 (emphasis supplied).

This Court has already recognized that passage of the CSRA "constitutes a strong congressional endorsement of the policy on which the federal labor relations program had been based since its creation in 1962." *Bureau of Alcohol, Tobacco and Firearms v. FLRA*, 464 U.S. at 103. In fact, the courts of appeals have uniformly concluded that the intent was to broaden, certainly not to narrow, the scope of collective bargaining. *New York Council, Ass'n of Civilian Technicians v. FLRA*, 757 F.2d at 508; *Library of Congress v. FLRA*, 699 F.2d 1280, 1283-86 (D.C. Cir. 1983); *National Treasury Employees Union v. FLRA*, 691 F.2d 553, 559 (D.C. Cir. 1982); *Department of Defense v. FLRA*, 659 F.2d 1140, 1154-56 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982). The CSRA "was designed to expand the scope of negotiations from its limited role under then existing law." *National Treasury Employees Union v. FLRA*, 810 F.2d 295, 299 (D.C. Cir. 1987).

In response to the undisputed congressional intent to retain and expand upon the negotiability rights existing under the executive orders, the Agency isolates certain statements in the legislative history and reads them out of context. Specifically, the history contains general statements that pay is non-negotiable; but these statements were made only because there had been a raging debate

over whether to make pay negotiable in all agencies. Legislators thus occasionally stated that the system of fixing pay by statute for the vast majority of federal employees was retained. "A close examination of the congressional reports and debates reveals that the [CSRA's] supporters made these statements with the understanding that Congress generally regulates such matters . . ., not with the understanding that the [Act] barred all wage negotiations." Pet. App. 10a.

All of the legislative history cited by the Agency can be explained in this manner, as addressing the battle over making wages negotiable for all, rather than negating the negotiability of wages for the few not governed by statute. For example, Congressman Udall stated that the statute would not "permit bargaining over pay." 124 Cong. Rec. 25,716 (1978), *Legislative History* at 850. But he clarified later, when he offered the ultimately accepted "Udall substitute," that pay bargaining was excluded because major enactments "about wages and hours and retirement and benefits will continue to be established by law through congressional action." 124 Cong. Rec. 29,182 (1978), *Legislative History* at 923. Nowhere does he suggest that pay bargaining for those few employees not governed by separate statute would suddenly be halted. On the contrary, he emphasized that the statute continues prior practices and, in fact, "gives Federal employees greater rights in labor relations than they have heretofore enjoyed." 124 Cong. Rec. 25,716 (1978), *Legislative History* at 850.

Similarly, Congressman Clay initially stated that "employees still . . . cannot bargain[] over pay," a statement that only applied to employees in general, not to the few whose wages were not set by law. 124 Cong. Rec. 24,286 (1978), *Legislative History* at 839. He also made clear that he accepted the "Udall substitute" only with the understanding that matters not governed by statute (or

otherwise expressly excepted) would continue to be negotiable:

> 7103(a)(14)(D), removing from subjects of bargaining those matters specifically provided for by Federal statute, was adopted by the Committee and retained in the Udall substitute with the clear understanding that only matters "specifically" provided for by statute would be excluded under this subsection. Thus, where a statute merely vests authority over a particular subject with an agency official given discretion in exercising that authority, the particular subject is not excluded by this subsection from the duty to bargain over conditions of employment.

124 Cong. Rec. 29,187 (1978), *Legislative History* at 933.

This same understanding is implicit in each of the statements made in the legislative history regarding the general unavailability of pay negotiations. Each reference was describing the situation for most workers, whose pay remained non-negotiable because of the exception for matters controlled by other statutes. As Congressman Ford stated, "no matters that are governed by statute (such as pay, money-related fringe benefits, and retirement and so forth) could be altered by a negotiated agreement." 124 Cong. Rec. 25,777 (1978), *Legislative History* at 855-56. Where pay matters were not governed by statute, however, bargaining rights remained as they were under the executive order program.

In sum, Congress declined to extend bargaining rights to all employees, but preserved the bargaining rights of those employees previously entitled to bargain over pay. Congress carried forward the language of the executive orders that had allowed bargaining over pay where not provided for by statute. General statements regarding the lack of bargaining rights over pay refer to matters governed by statute for most workers. They cannot fairly be read to negate the affirmative evidence of con-

gressional intent to retain the bargaining allowed under executive orders for "policies and practices and matters affecting working conditions," including wages of the few employees not governed by statute.

E. Under This Statutory Scheme, It Is More Likely That Congress Would Have Specifically Excepted Pay, If It Did Not Intend For Pay Ever To Be Negotiated.

Finally, the Agency incorrectly asserts (Pet. Br. 26) that "common sense suggests that Congress would not authorize collective bargaining" over something so major as compensation, without expressly listing wages as negotiable. On the contrary, given the structure of the CSRA and its predecessor executive orders, and the provision of pay by statute for all but a few federal employees, "common sense suggests" that Congress would have specifically excluded pay for all, if it had so intended.

It is not surprising that Congess followed the lead of Presidents Kennedy and Nixon by not including the word "wages" when defining negotiable matters. Wages had never been expressly referenced before, and yet the reference to personnel policies and practices and matters affecting working conditions had always been interpreted to encompass compensation. So, too, Congress used the broad, generic phrase "conditions of employment," defining it in the same language used in the executive orders. It intended this phrase to be "expansively defined." *EEOC v. FLRA*, 744 F.2d at 845.

Moreover, the statute does not list *any* examples of conditions of employment subject to collective bargaining. Under this particular statutory scheme, only those matters that are excluded from incidents of employment are listed: *i.e.*, matters relating to prohibited political activities, to classifications and to matters provided for by Federal statute. 5 U.S.C. 7103(a)(14). Congress did not exclude all pay matters, as it could easily have done, but

rather excluded only pay and other issues "specifically provided for by Federal statute." *Id.*

Despite this statutory scheme and historical context, the Agency believes that pay should have been expressly referenced, perhaps because it wrongly believes that wages of large numbers of employees are not set by statute (*see* Pet. Br. 9 n.4).[3] In fact, however, the number of affected employees—those workers covered by the CSRA whose wages are not fixed by statute—is relatively few.

The Agency and the respondent union together are able to list very few federal employees who would be affected by the ruling here: the teachers and staffs at DOD dependent schools, such as those involved in this case and those overseas (20 U.S.C. 241; 901-07); faculty members at the U.S. Merchant Marine Academy (46 App. U.S.C. 1295g(d)); civilian mariners working for the Navy (5 U.S.C. 5348); electricians at the Bureau of Engraving and Printing (5 U.S.C. 5349(a)); and employees within bargaining units at the Federal Deposit Insurance Corporation (FDIC) (12 U.S.C. 1819) and the Nuclear

[3] The Agency also argues that the availability of impasse procedures somehow makes it more likely that Congress did not intend to allow any pay bargaining. Pet. Br. 26. It is true that Congress has authorized the Federal Service Impasses Panel to assist in resolving bargaining impasses, taking "whatever action is necessary and not inconsistent with [the CSRA] to resolve the impasse," including ordering the parties to adopt specific contract proposals, when all else fails. 5 U.S.C. 7119(c)(5)(B)(iii).

Panel decisions have consistently demonstrated, however, that the Panel examines the reasonableness of a contract proposal in considering whether its language should be adopted by the parties. *See Veterans Administration Medical Center, Tampa, Florida v. FLRA*, 675 F.2d 260, 265 n.9 (11th Cir. 1982). Moreover, judicial review of Panel decisions may be obtained through unfair labor practice procedures, pursuant to which "the courts may review the validity of the Panel order in question." *Council of Prison Locals v. Brewer*, 735 F.2d 1497, 1500 (D.C. Cir. 1984). There is no reasonable fear, therefore, that the Panel will order the adoption of improper pay proposals.

Regulatory Commission (NRC) (42 U.S.C. 2201(d)), which are represented by NTEU. The numbers of NTEU's bargaining unit employees at FDIC and NRC, at least, are small. Our latest figures indicate that there are 1,333 bargaining unit employees at FDIC and 1,950 at NRC.

The number of workers whose pay is not set by statute, therefore, is not so large as to make it likely that Congress would have departed from prior practice and specifically listed wages, when allowing such employees to negotiate over pay. Retaining the traditional inclusion of pay matters through the use of the phrase "conditions of employment" was perfectly reasonable.

Nor does the express reference to wages for certain "prevailing rate" employees in any manner suggest that Congress viewed wages as non-negotiable for all workers. *See* CSRA, Tit. VII, § 704, 92 Stat. 1218, *reprinted in* 5 U.S.C. 5343 note and *Legislative History* at 108. Certain skilled blue-collar workers traditionally negotiated over wages before 1972. When the Prevailing Rate Act was enacted in that year, it specified that most such skilled craftsmen were to receive "prevailing rates" for their jobs. 5 U.S.C. 5343. Section 9(b) of the Prevailing Rate Act, however, provided a "grandfather clause" to preserve the bargaining rights of the covered workers who negotiated over pay before 1972. 5 U.S.C. 5343 note. The Comptroller General nonetheless interpreted the Prevailing Rate Act as making the overtime provisions of 5 U.S.C. 5541-5550 applicable and thus beyond the scope of bargaining, even for the employees encompassed by the "grandfather clause." *Department of Interior*, 57 Comp. Gen. 259 (1978), *Legislative History* at 1137; *Department of Interior*, Comp. Gen. B-191520 (June 6, 1978), *Legislative History* at 1144.

In the CSRA, therefore, Congress decided both to continue the pay bargaining rights of the skilled craftsmen within the grandfather clause of the Prevailing Rate Act,

and to overturn the Comptroller General decisions, so as to allow such employees to bargain over all pay matters. *See* 124 Cong. Rec. 25,722 (1978), *Legislative History* at 857 (remarks of Rep. Ford); H.R. Rep. No. 1717, 95th Cong., 2d Sess. 159 (1978), *Legislative History* at 827.

For these reasons, Congress expressly provided that the craft employees who bargained over compensation before 1972 could continue to negotiate over "terms and conditions of employment and other employment benefits," including "pay and pay practices." CSRA, Tit. VII, § 704, 92 Stat. 1218, *reprinted in* 5 U.S.C. 5343 note and *Legislative History* at 108. To achieve its purpose, Congress had to include an express reference to pay. Nothing in section 704's language, however, suggests that pay is a "term" but not a "condition" of employment. The joint phrase "terms and conditions" was merely used, as it was in the NLRA, to describe all incidents of employment, including pay. *See supra* at 9-10.

In sum, nothing in the structure of the CSRA suggests that Congress would have departed from past practices and specifically mentioned pay, when allowing pay bargaining by those few employees whose wages are not set by statute.

II. PAY PROPOSALS DO NOT INTERFERE WITH AN AGENCY'S RIGHT TO DETERMINE ITS BUDGET UNDER 5 U.S.C. 7106(a)(1).

The Agency next argues that, even if wages are "conditions of employment" generally subject to negotiation, they should be excluded from collective bargaining as interfering with management's right "to determine the . . . budget . . . of the agency," under 5 U.S.C. 7106 (a)(1). This alternative argument, however, is flawed at its inception. If Congress intended workers whose pay is not set by statute to negotiate over wages, it certainly would not have intended that right to be barred through the back door, by virtue of the management right provision.

As the D.C. Circuit has pointed out, section 7106 "should not be interpreted to negate the Act's broad duty to bargain," but rather to protect only "'genuine managerial prerogatives,'" because Congress directed that the clause was "'to be read to favor collective bargaining whenever there is doubt as to the negotiability of a subject or a proposal.'" *EEOC v. FLRA*, 744 F.2d at 848-49, *quoting* 124 Cong. Rec. 29,199 (1978) (remarks of Rep. Ford), *Legislative History* at 956 and H.R. Rep. No. 1403, 95th Cong., 2d Sess. 44 (1978), *Legislative History* at 690. The FLRA, with judicial approval, has determined that section 7106 is contravened only where an agency has demonstrated that a union proposal would "directly interfere" with one of the specified management rights. *See Department of Defense v. FLRA*, 659 F.2d at 1159.

The FLRA's decisions concerning the scope of an agency's right to determine its budget reflect an appreciation of the statutory balance struck between Congress' objective of expanding collective bargaining and its intent also to protect "genuine managerial prerogatives." Thus, the FLRA has rejected the position that a union proposal interferes with an agency's right to determine its budget simply because the proposal would impose additional costs. "Such a construction of the Statute," the FLRA reasons, "could preclude negotiation on virtually all otherwise negotiable proposals, since, to one extent or another, most . . . would require the expenditure of appropriated agency funds. Nothing in the relevant legislative history indicates that Congress intended the right of management to determine its budget to be so inclusive as to negate in this manner the obligation to bargain." *American Federation of Government Employees, AFL-CIO and Air Force Logistics Command, Wright-Patterson Air Force Base, Ohio*, 2 F.L.R.A. 604, 607 (1980) (*Wright-Patterson*). Indeed, the D.C. Circuit has held that an agency cannot rely on monetary considerations—or even economic hardship—

as a reason for releasing it from its duty to bargain. *American Federation of Government Employees, AFL-CIO v. FLRA*, 785 F.2d 333, 337-38 (D.C. Cir. 1986).

The FLRA has established a two-part test for determining whether a proposal infringes on an agency's right to set its budget. This test considers whether 1) whether a proposal prescribes agency programs or specific amounts of money to fund programs; and 2) whether agency management has shown that the proposal unavoidably causes a significant increase in costs that is not offset by compensating benefits. *Wright-Patterson*, 2 FLRA at 608. As the Eleventh and Second Circuits have recognized, the pay proposals at issue here, which do not prescribe a particular amount of money for salaries, meet the reasonable and consistently applied *Wright-Patterson* test. Pet. App. 19a-20a; *West Point Elementary School Teachers Ass'n*, 855 F.2d at 943-944.

The Agency does not seem to take issue with the first part of the *Wright-Patterson* test, which is met here because the proposal does not prescribe a program or specific amounts of money for a program. *See* Pet. Br. 28. Certainly, a pay proposal that merely sets a formula by which salaries would be adjusted, while management retains control over the number and distribution of employees and specific amounts to be applied to programs, is not objectionable simply because it will lead to an expenditure of money. Such a construction would mean that management's budget right would swallow the rule favoring bargaining rights because virtually all proposals have attendant costs.[4]

[4] The Agency does object to the lower court's conclusion that the specific pay proposals at issue would not significantly affect the Army's enormous budget. Despite the clear statutory language preserving management's right to determine the budget "of the agency" (section 7106(a)(1)), management wants the proposal to be considered solely in light of expenditures of the program employing the affected workers rather than of the agency as a whole

Similarly, the Agency does not challenge the FLRA's test requiring a significant budgetary increase before a proposal is deemed to interfere with the budget right. *See* Pet. Br. 28. Rather, the Agency objects only to the FLRA's requirement that management show that any significant increase in cost would not be offset by compensating benefits—a challenge based on the theory that an agency's weighing of costs versus benefits lies at the heart of the budget process. *Id.*

If the Agency's theory is correct, however, then management should routinely be able to produce evidence of a cost-benefit analysis and has nothing to fear so long as its analysis is rational. The problem arises, for employees and their unions, when agencies peremptorily reject a proposal bearing cost implications while refusing to produce any evidence that management actually has studied the question and reasonably concluded that cost truly outweigh the benefits to be derived from the proposal. In those circumstances, management should certainly not be allowed to escape bargaining through incantation of its mystical budgetary powers.

For example, an agency must not be allowed to hide behind the budget right where it fails to address the issue of compensatory benefits. *See Nuclear Regulatory Commission v. FLRA*, 859 F.2d 302, 312 (4th Cir.), *rev'd*, 879 F.2d 1225 (4th Cir. 1989) (en banc), *petitions for cert. pending*, Nos. 89-108, 89-562. The FLRA test prevents such behavior and insures that an agency will not ignore compensating benefits to be derived from a pay proposal, including increased productivity, reduced turnover, and improved employee performance.

This requirement is particularly appropriate in a field, such as education or science, where there is great competi-

(Pet. Br. 28-30). In any event, the Agency's complaints about the allegedly great cost of the specific pay proposals in this case have weight, if at all, only in the context of labor-intensive fields, such as education.

tion from the private sector for trained and experienced employees. Indeed, Congress has given the NRC authority to depart from the GS pay system precisely because of the difficulty of securing the employment of qualified scientists, technicians and other workers in the field. *See* 42 U.S.C. 2201(d). An agency must not be allowed to reject a pay proposal out-of-hand; it is completely warranted for the FLRA to require management to show that a proposal is unjustified under a sound cost-benefit analysis.

III. PAY BARGAINING IS CONSISTENT WITH AGENCY AUTHORITY WHERE A STATUTE GIVES THE AGENCY A SIGNIFICANT DEGREE OF DISCRETION TO SET WAGES.

The Agency's third argument is that the specific pay proposals here conflict with an agency rule for which there is a "compelling need," within the meaning of 5 U.S.C. 7117(a)(2). The precise question here is whether there is a "compelling need" for a particular Army regulation. That regulation interprets a statute that requires education at dependents schools to be provided, "[t]o the maximum extent practicable" at a per-pupil cost equal to that in the local schools. 20 U.S.C. 241 (e). The Army regulation provides that education in the dependents schools will be deemed comparable to local public education when various factors, including "salary schedules," are "to the maximum extent practicable, equal." Army Reg. 352-3, 1-7 (h) (1980).

When considering the "compelling need" for the Army regulation under 5 U.S.C. 7117(a)(2), the Court will be examining the type of authority Congress gave the Army to set the pay of the particular employees here. This is the same type of analysis that must be made in cases where the issue is whether a pay proposal is "inconsistent with" a statute allowing an agency to set wages. *See* 5 U.S.C. 7117(a)(1). In both situations, the basic question is whether the agency has sufficient statutory discretion to bargain over pay.

The Agency here seems to argue that pay bargaining is barred unless management has virtually unfettered discretion to set wages. In the Agency's view, pay bargaining would be prohibited even without the regulation at issue, because the authorizing statute directs the Army Secretary to limit per-pupil costs to such costs in local public schools, "to the maximum extent practicable." Pet. Br. 32-33. This position, however, is an extreme one that would prohibit pay bargaining where Congress has provided relatively vague guidelines to govern an agency's authority to set pay. Once again, therefore, the Agency is advocating a reading that would negate Congress' decision to allow pay bargaining by the few employees whose pay is not actually "provided for by Federal statute."

Moreover, the Agency's position conflicts with the rationale of the FLRC holdings discussed above, which Congress implicitly adopted. In *Overseas Education Ass'n and Department of Defense Dependents Schools*, the FLRC allowed bargaining over pay matters for teachers at dependents schools, where the applicable statute, similar to the one in this case, directed that basic compensation for ODS teachers was to be calculated on a parity with such compensation for teachers in the United States. Such a limitation on the agency's authority, requiring it to achieve parity with another pay structure, did not prohibit the agency from bargaining over pay matters under the executive order program. 6 F.L.R.C. at 232-33. The FLRC decision in *United Federation of College Teachers Local 1460 and U.S. Merchant Marine Academy* is to the same effect. A statute requiring salary scales at the Merchant Marine Academy to be "similar" to those of the U.S. Naval Academy did not render compensation non-negotiable. 1 F.L.R.C. at 212.

In any event, however, even if pay bargaining could be held prohibited in this case because of the particular statute here, such bargaining would not be prohibited where a law gives an agency even wider discretion to set its em-

ployees' wages. The statute here directs that dependents schools' costs be tied to costs at local schools, "to the maximum extent practicable." 20 U.S.C. 241(e). Congress, however, has provided different degrees of discretion over pay in other statutes.

For example, pursuant to section 161(d) of the Atomic Energy Act, the NRC made a unilateral decision in 1975 that it was "necessary to the discharge of its responsibilities" to opt out of the Classification Act and set the wages of its personnel. *See* 42 U.S.C. 2201(d); *Nuclear Regulatory Commission v. FLRA*, 879 F.2d at 1233. Having thus exempted its employees from the GS pay system because of private sector competition, the question becomes how bargaining over a proposal to make salaries comparable to those in the private sector could conflict with the NRC's statutory discretion.

In other words, the precise extent to which an agency has discretion to set wages under a particular statute is all important in assessing the availability of pay bargaining under either 5 U.S.C. 7117(a)(1) or 7117(a)(2).

CONCLUSION

For these reasons, the rulings below should be affirmed.

Respectfully submitted,

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ADDENDA

ADDENDUM A

National Agreement Between National Treasury Employees Union and Internal Revenue Service, National Office, Regions and Districts, NORD III, Doc. 6647 (Rev. 7-89)

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